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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE CRISP,

Defendant and Appellant.

2d Crim. No. B249068
(Super. Ct. No. BA397323-01)
(Los Angeles County)

Andre Crisp appeals a judgment after conviction by jury of forcible rape (Pen. Code, § 261, subd. (a)(2)),¹ forcible oral copulation (§ 288a, subd. (c)(2)(a)), and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)). The jury found true allegations that Crisp personally inflicted great bodily injury "during the commission of" the rape. (§ 667.61, subd. (a) & (d)(6).) This finding subjected him to life in prison. (*Ibid.*) The jury also found that Crisp personally inflicted great bodily injury under circumstances involving domestic violence during the commission of the assault. (§ 12022.7, subd. (e).) It found not true an allegation that he inflicted great bodily injury during the forcible oral copulation. The jury acquitted Crisp of sexual penetration by a foreign object and making criminal threats. (§§ 289, subd. (a)(1)(A), 422.)

¹ All statutory references are to the Penal Code unless otherwise stated.

The trial court sentenced Crisp to an aggregate term of 34 years to life in state prison consisting of 25 years to life for rape with personal infliction of great bodily injury and full and consecutive terms of six years for forcible oral copulation, and three years for assault. (§ 667.6, subds. (c) & (d).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Crisp and I.A. had a dating relationship with a history of domestic violence. Police responded several times to reports of domestic disputes at their apartment, but made no arrests.

On December 29, 2010, Crisp and I.A. argued because I.A. spent time away from the apartment with a friend, Pamela W. Crisp disapproved of Pamela. He sent I.A. a series of increasingly angry text messages from early in the afternoon until late in the evening.

I.A. returned to the apartment at 10:30 or 11:00 p.m. She and Crisp fought. He raped her. Whether Crisp injured I.A. before or during the rape was the subject of conflicting evidence. At trial he testified that I.A. consented to sex.

The next morning, I.A. called Pamela for help. Pamela took I.A. to a hospital in a taxi. I.A. had a fractured nose. She had bite marks on her cheek, lips, and shoulder. Her face was bruised and swollen. A patch of her hair was missing. A sample of her urine tested positive for amphetamines, methamphetamines, cocaine, and other controlled substances. On the way to the hospital, I.A. told Pamela that Crisp beat her, raped her, bit her face, and forced her to orally copulate him while her lips were bleeding.

Police Officer Harris Cho interviewed I.A. at the hospital. She told him that Crisp threatened to kill her when she first entered the apartment on the evening of December 29. She said Crisp pulled her around by the hair, punched her, and choked her into unconsciousness. When she regained consciousness, she was on the living room floor. Crisp punched and kicked her. He put her on the couch, told her she was "going to die tonight," pulled off her clothes and put his finger in her vagina. He choked her again, bit her face and lips, and asked her to orally copulate him. She tried to calm him down and appease him. She performed oral sex. He turned her over onto her stomach and

forcibly penetrated her vagina with his penis while hitting her in the back of the head. Again, he said he was going to kill her. He turned her on her back, penetrated her, and asked her to orally copulate him again, which she did. He pulled her onto the floor and choked her into unconsciousness. When she awoke, she tried again to appease him by making the bed and lying down with him. He said he was going to kill her while she slept.

At the hospital, I.A. gave similar accounts to a nurse, a physician's assistant, and other police officers. About a week later, she told a detective and a deputy district attorney that she was afraid to go back to her apartment and wanted to be relocated.

I.A. later recanted. Two years after the incident, I.A. told a deputy district attorney that she agreed to have sex with Crisp and he did not rape her. She said she initiated sex to stop the fight. At trial, I.A. said she could not remember whether they had sex. The trial court found that she was deliberately evasive. The court permitted Officer Cho to testify about I.A.'s statements to him at the hospital.

Crisp testified that he hit I.A.'s nose and split her lip, but he did not bite or choke her, and he did not sexually assault her. He said that after they fought, they smoked marijuana, watched a movie, and then had consensual sex. He said 30 minutes elapsed between the fight and the sexual encounter.

DISCUSSION

Jury's Request that Court Clarify the Phrase "During the Commission of"

Crisp asks us to reverse the finding that he inflicted great bodily injury during the rape because the trial court did not clarify the term "during the commission of that crime" when the jury asked it to do so. The phrase did not require further definition because it is commonly understood.

Section 667.61, subdivision (d)(6) imposes a sentence of 25 years to life for rape if "[t]he defendant personally inflicted great bodily injury on the victim or another person in the commission of [the offense]." The standard instruction given uses the phrase "during the commission of." (CALCRIM No. 3160.) During deliberations, the

jury asked the trial court to "clarify for the jury how to interpret the phrase 'during the commission of that crime' in instruction [CALCRIM No.] 3160 [§ 667.61, subds. (a) & (d)(6)]." They wrote, "The confusion is specifically about 'during.' When does the act begin and when does it end?"

The trial court conferred with counsel, neither of whom proposed a clarifying instruction. The court asked whether "during" has a special legal definition. Counsel did not supply one. The court researched the issue, and concluded there was no further definition to provide. It responded to the jury: "The court cannot further clarify instruction 3160 beyond what you have already been provided." The court refused a defense request to direct the jury to the unanimity instruction.

Counsel did not render ineffective assistance because no further definition was required. Section 1138 imposes a duty on the trial court to "clear up" a jury's expressed instructional confusion, but does not necessarily require further instruction. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) If the original instructions are themselves full and complete, the trial court has discretion to determine what additional explanations are sufficient. (*People v. Dykes* (2009) 46 Cal.4th 731, 802.) In some circumstances, reference to the surrounding instructions, without further clarification, is sufficient. (*Gonzalez*, at p. 1213 [trial court did not abuse its discretion when it referred the jury to existing instructions and did not further define "malice" in response to a request for clarification, because the term was not used in a technical sense peculiar to the law]; see also *People v. Rowland* (1992) 4 Cal.4th 238, 270-271 [the phrase "while engaged in" rape, for purposes of a felony-murder special circumstance finding, requires no clarification].)

Although Crisp contends that the phrase "during the commission of" has a meaning peculiar to the law, he has not articulated that meaning or offered authority that would support a clarifying instruction. In the absence of any authority assigning a peculiar technical meaning to the phrase, "during the commission of," the trial court did not abuse its discretion when it declined to define the phrase.

Defense Request to Have Expert Conduct Testing Related to Bite Marks

Crisp contends the trial court abused its discretion and denied his rights to present a defense and to due process when it refused a mid-trial request to conduct bite-mark testing. He further contends that his trial counsel rendered ineffective assistance because he did not have tests performed earlier. We disagree.

The bite marks on I.A.'s face and shoulder were an issue from the day of Crisp's arrest. Defense counsel retained a dental expert more than one year before trial. Based on their many conversations, defense counsel expected the expert to testify that bite-mark evidence is not reliable evidence of identification. But over the lunch hour on the day he was to testify, the expert told counsel "actually, you can use a bite mark analysis to exclude an individual."

Counsel reported this to the trial court in camera and said he could no longer present the planned testimony. He asked for a continuance so the dental expert could conduct testing to determine if the bite marks would exculpate Crisp. He represented that the expert could conduct the tests that afternoon and present any exculpatory results the following day.

The trial court acted within its discretion when it denied the request. It found that the expert's change of opinion did not constitute good cause for continuance and that the requested continuance would force a mistrial creating a "horrible miscarriage of justice." The request to conduct testing was untimely. (§ 1054.3.) The case had gone beyond the time estimate and was "on the verge of losing jurors." The trial court noted that the prosecution would be entitled to retain an expert to respond to any test results, and this necessarily would cause more delay. There were not sufficient alternates because of a "grossly" inadequate trial estimate. One juror would have to leave if the case continued beyond the following week and other jurors had expressed similar concerns. It was apparent to the court that I.A. suffered "significant psychological trauma" when she testified. It found that forcing her to do so again would be "beyond inhumane." The court suggested that counsel raise the issue in a motion for new trial "if something comes up and if Mr. Crisp is convicted." The record contains no such motion.

Crisp points out that the testimony of a witness may be prohibited for failure to timely disclose it only upon a showing of significant prejudice and willful conduct. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.) But the trial court did not prohibit the dental expert's testimony. It denied an untimely request to conduct testing mid-trial based on facts that were known from the time of arrest.

Even if the decision had been erroneous, it was not prejudicial. Bite mark testing would have had little effect on the verdict. The bite marks were not the sole evidence of injury. Crisp acknowledged that he inflicted other injuries upon I.A.. He fractured her nose when he hit her. He apologized for biting her in a recorded telephone call from jail. Nothing in the record suggests that bite mark testing would have exonerated, rather than inculpated, Crisp.

Restriction of Evidence to Impeach the Testimony of the Complaining Witness

We reject Crisp's contention that the trial court abused its discretion and deprived him of constitutional rights by limiting the evidence of I.A.'s past criminal conduct to impeach her. The trial court acted within its broad discretion under Evidence Code section 352 to exclude unduly cumulative, prejudicial, confusing, or time-consuming impeachment evidence.

The trial court admitted extensive evidence of I.A.'s prior charged and uncharged acts of moral turpitude. Among other things, it admitted testimony that I.A. was a prostitute, a liar, and a drug user. It admitted evidence that she suffered misdemeanor convictions for giving false identification to a police officer and using a fictitious identification card. It admitted testimony that in April 2012 I.A. forged a check and tried to cash it, resulting in a grand theft conviction and that she gave a false name when she was arrested. It also admitted testimony that she was convicted of receiving a stolen computer in July 2012. I.A. testified that in February 2010 she had three false driver's licenses and three false social security cards in her purse when police contacted her, and in March 2010 she gave false information to police officers. She testified she had been to jail five times. The court admitted evidence that she "worked" the system in

an effort to trade her testimony for favorable treatment on probation violations, and that she tried to persuade a prosecutor to back-date paperwork for her relocation.

The trial court did not allow defense counsel to explore some of the facts underlying the conduct. It did not allow counsel to present evidence that I.A. gave a false name on two occasions and possessed drug paraphernalia. It did not allow counsel to present the testimony of an ex-boyfriend about I.A.'s fighting and suicidal threats. But the court reasonably concluded that the probative value of this evidence was minimal and would be unduly time-consuming. Time consumption was a serious problem in this case. The defense witness list consisted of 31 witnesses. I.A.'s propensity for giving false information, using drugs, and engaging in violence was fully presented. The court properly exercised its power "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Ayala* (2000) 23 Cal.4th 225, 301.)

References to "Rape Kit"

Crisp's trial counsel did not render ineffective assistance by not objecting to use of the term "rape kit." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Crisp has not demonstrated deficient performance. The term "rape kit" is not unduly inflammatory, and there were legitimate tactical reasons not to quibble over its use. Crisp has not shown that the result would have been any different if counsel had objected. No authority supports the objection, and the term "rape" was a necessary part of the evidence, arguments, and instructions in the case.

I.A.'s Prior Out-of-Court Statements

The trial court did not err when it allowed Officer Cho to testify about I.A.'s prior out-of-court statements.

Crisp contends the statements were inadmissible because I.A. did not first offer inconsistent trial testimony. (Evid. Code, §§ 770, 1235.) But "a witness's deliberate evasion of questioning can constitute an implied denial that amounts to inconsistency, rendering a prior statement admissible under Evidence Code section 1235." (*People v. Cowan* (2010) 50 Cal.4th 401, 463.) There is a reasonable basis in the record for the trial

court's determination that I.A. was being deliberately evasive when she claimed not to know or remember what happened between her and Crisp. I.A. had not been in contact with the prosecutor for six months and did not appear for trial in response to a subpoena until she was arrested. She said she did not want to testify against Crisp. Her firm allegiance to him was evidenced by 99 recorded jail telephone calls. Cho's testimony was properly admitted pursuant to section 1235.

Witness Advocate

We reject Crisp's contention that he was entitled to a curative instruction because the witness advocate unduly influenced the jury.

The complaining witness in a prosecution for rape may be accompanied by a witness advocate. (§ 868.5, subd. (a); *People v. Stevens* (2009) 47 Cal.4th 625, 641.) The trial court, in its discretion, may remove a witness advocate who improperly influences the jury. (§ 868.5, subd. (b).)

The record does not disclose any circumstances indicating that I.A.'s witness advocate improperly influenced the jury. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214.) Before I.A. testified, the trial court briefly explained the role of the advocate to the jury. It said that "[the advocate] is not here to influence testimony." I.A. became emotional during her testimony. While she was looking at pictures and listening to recordings, the advocate touched her and rubbed her back. Defense counsel brought this to the court's attention. The court admonished the prosecutor to have the advocate "tone that down a little bit." The advocate curtailed the behavior. Defense counsel later asked for a mistrial or a curative instruction.

The trial court denied the motion for mistrial. It instructed the jury to base its decision on the evidence and not to be swayed by sympathy. It found that "doing more than that is going to highlight that." The advocate's conduct, as described by the trial court on the record, was not of such a character as to prejudice the defendant or influence the verdict. (*People v. Myles, supra*, 53 Cal.4th 1181, 1215.) "Having observed the courtroom proceedings firsthand, the trial judge was in the best position to

evaluate the impact of [the witness advocate's] conduct in front of the jury." (*Id.* at pp. 1215-1216.)

Testimony That Crisp Was Wanted for Attempted Murder

Officer Carrillo arrested Crisp two days after the incident. He testified that he was in the area because of "a wanted attempt murder/rape suspect." The trial court overruled a defense motion to strike. Crisp did not preserve his contention that the statement was unduly prejudicial by stating the basis for his objection at trial. (Evid. Code, § 353, subd. (a).) Moreover, the trial court did not abuse its discretion by admitting the evidence. It was probative to explain why Carrillo arrested Crisp; the statement was extremely brief, and the risk of confusion was minimal because Crisp's victim was undisputedly alive. (*Id.*, § 352.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Henry J. Hall, Judge
Superior Court County of Los Angeles

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